In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 993

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

Petitioners seek certiorari before judgment to obtain direct review in this Court of orders of the Federal Communications Commission adopted in 1967 which promulgate certain rules governing personal attacks and political editorials broadcast over facilities of Commission licensees. Their petitions for review in a court of appeals under 28 U.S.C. (Supp. II) 2342—challenging the rules as unauthorized by the Communications Act and in violation of the First Amendment—are presently pending before the Seventh

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Circuit, and that court has not yet considered the merits of the petitions.

Petitioners urge that certiorari be granted in advance of any consideration of their challenge to the Commission's rules by the court of appeals, or indeed any court, so that the case can be considered here together with *Red Lion Broadcasting Co.* v. *Federal Communciations Commission,* No. 600, this Term in which certiorari was granted on December 4, 1967. *Red Lion* involves an application of the Commission's "fairness doctrine," upon which the Commission's new rules are based, to a personal attack against a political writer which was broadcast in 1964 over radio station WGCB, in Red Lion, Pennsylvania. On the facts there presented the Commission held that it was the station's duty under the fairness doctrine to inform the person impugned of the attack and to offer him a comparable opportunity to respond. On petition for review by the station's licensee, the Court of Appeals for the District of Columbia Circuit sustained the Commission.

While the petition for certiorari in *Red Lion* was pending, the instant petitioners filed briefs *amici curiae* urging that the Court defer disposition of that petition until the Seventh Circuit had decided the merits of their challenge to the Commission's rules. The government opposed this suggestion on the ground that *Red Lion* "involves a concrete and focused application of the Fairness Doctrine, while the Seventh Circuit cases present a sweeping attack on necessarily general rules, unilluminated by specific facts" (Br. in Opp., p. 12). After certiorari was granted, the government moved the Seventh Circuit

to hold petitioners' challenges to the rules in abeyance pending this Court's decision in *Red Lion*.[1] Further proceedings in the court of appeals have been deferred pending disposition of the instant petition by this Court.

DISCUSSION

Although the *Red Lion* case raises constitutional and statutory issues which have close relation to the instant case, we believe that it would be inappropriate for this Court to review the Commission's rules in advance of decision by the court of appeals. First, such action would constitute initial review of agency regulations by this Court, at least arguably an exercise of original jurisdiction not authorized by the Constitution; we suggest it would be inappropriate to resolve that serious and difficult question in circumstances where there is no compelling need to do so. Moreover, the general and abstract nature of petitioners' across-the-board attack on the rules, in contrast to the concrete controversy presented in *Red Lion*, makes it highly desirable that the issues in the instant case be sifted and refined by the court of appeals before they are presented to this Court. Finally, to the extent that petitioners' interests are directly

[1] In its motion the government asserted that, in view of the fact that the cases "present the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness doctrine and personal attack policy as does *Red Lion*, we believe that it would serve the ends of justice and avoid an unnecessary burden upon the judicial process to hold these cases in abeyance pending resolution of these basic issues by the Supreme Court" (Motion of Resp. to hold petitions for review in abeyance, C.A. 7, Nos. 16,369, 16,498, 16,499).

affected by the issues presented in *Red Lion*, they can adequately represent those interests—and assist this Court—by submitting briefs as *amici curiae* in that case.[2]

1. Although this Court's appellate jurisdiction is defined by Congress (*Cohens* v. *Virginia*, 6 Wheat. 264; *Ex parte McCardle*, 7 Wall. 506), its original jurisdiction is defined by the Constitution itself—in Article III, Section 2—and can neither be expanded nor contracted by statute. *Marbury* v. *Madison*, 1 Cranch 137. Initial review of regulations of an administrative agency is plainly not within the scope of this Court's original jurisdiction as defined in the Constitution. Petitioners do not dispute this (Pet. 14–15). What they assert, however, is that review of agency action by granting certiorari in advance of judgment by a lower court constitutes an exercise of this Court's appellate, not original, jurisdiction (*ibid.*). As petitioners concede, this constitutional question has as yet not been definitely resolved by this Court (Pet. 14). Whatever indications there are on this question in the reported decisions of this Court cast serious doubt on petitioners' proposition that initial judicial review of agency action constitutes an exercise of appellate jurisdiction. See *Wheeler Lumber Bridge & Supply Co.* v. *United States*, 281 U.S. 572, 576; *Old Colony Trust Co.* v

[2] Indeed, petitioners obtained the government's consent to file *amici* briefs in *Red Lion* when that case was pending on petition for certiorari, and we have already consented to their filing *amici* briefs on the merits in that case. Petitioners have also filed a motion for leave to argue *amici curiae* in *Red Lion* should the instant petition not be granted.

Commissioner of Internal Revenue, 279 U.S. 716, 728–729; *United States* v. *Rice,* 327 U.S. 742, 747; see also *International Ass'n of Machinists* v. *National Labor Relations Board,* 361 U.S. 881, where certiorari before judgment in a court of appeals' proceedings for review of a Board order was sought and denied.

It can of course be argued, as do petitioners, that judicial review of agency action is essentially an appellate function because the reviewing court simply "revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Marbury* v. *Madison,* 1 Cranch 137, 175. If that argument has force, it would appear to be in a case where an agency has acted in a quasi-judicial capacity rather than where, as here, judicial review of quasi-legislative action—rulemaking—is sought. In the latter situation, as in actions to enjoin the operation of statutes, it is more difficult to maintain that a "cause already instituted" is involved and that the suit is essentially a continuation of proceedings before the legislative body. Cf. *Ex parte Young,* 209 U.S. 123. Here there has been no judgment by any court as to the validity or invalidity of the Commission's rules. Yet this Court can ordinarily exercise appellate jurisdiction only by affirming, reversing or modifying the order or decision before it for review.

Petitioners' reference to the fact that this Court has considered certified questions relating to agency action prior to judgment in a lower court is beside the mark. In such cases the court of appeals has given consideration to the questions raised and has acted

judicially in formulating the certificate which is filed in this Court. Under the certification procedure this Court simply answers the question posed, affirmatively or negatively; there is thus no need for a judgment or order below upon which the Court can act in a reviewing capacity. And the certification procedure has traditionally been restricted to "definite and distinct questions of law" to avoid the possibility, which might otherwise exist, that the court in considering and deciding a certified question would be exercising original, rather than appellate, jurisdiction. *E.g., Old Colony Trust Co., supra; Wheeler Lumber Bridge & Supply Co., supra.*[3]

Moreover, this Court has consistently avoided reaching and deciding constitutional questions when it was unnecessary to do so. This approach should peculiarly apply to constitutional questions relating to the scope of the Court's own jurisdiction under Article III. We are not prepared to assert that all situations where direct review of agency action is sought would involve an improper exercise of this Court's original jurisdiction. We do view the question as a difficult one, and believe that it should not be resolved unless and until presented in a context where it appears essential for the Court to review an agency action directly, if it is found to have constitutional authority to so act. The instant case, we submit, does not present such a situation. Here petitioners can plainly

[3] Nothing in the language of 28 U.S.C. 1254(3) nor in Rule 28(2) of this Court's revised rules is to the contrary. See *United States* v. *Rice*, *supra;* see also Rule 28(1) of this Court's revised rules.

achieve their basic purpose—insuring that their voice is heard in connection with the Court's consideration and resolution of the issue presented in *Red Lion* (see Pet. 13)—through other means (see note 2, *supra*). Sound judicial policy thus argues against reaching and resolving the constitutional issue which petitioners present.

2. We realize, of course, that the Court has occasionally granted certiorari before judgment in order that it might have before it several related cases for consideration and decision at the same time (see Pet. 14, n. 21). But this has hardly been a uniform or invariable practice; the grant of certiorari before judgment has depended on the particular situations involved on each occasion. Here, in our view, there are distinctions between *Red Lion* and the instant case which, especially in light of the jurisdictional issue (discussed *supra*, pp. 4–7), argue against following the suggested procedure.

First, as petitioners point out, *Red Lion* involves a concrete, after-the-fact application of the general fairness doctrine to a specific personal attack. Petitioner in that case complains of a defined injury as a result of the Commission's order directed against it, and challenges the fairness doctrine in the context of the Commission's express ruling which is there involved. Moreover, the Court in *Red Lion* will have the benefit of the court of appeals' consideration of the issues presented, including the D.C. Circuit's extensive opinion. On the other hand, the contentions of petitioners in the instant case do not arise in a specific context at all. There is no record of any concrete, alleged violation by any of them. Instead, they make

a sweeping and generalized attack on the Commission's rules, and a variety of contentions about the arguable scope of rules. If this is an appropriate case for judicial review,[4] the court of appeals, by exercising the exclusive jurisdiction Congress conferred on it under 28 U.S.C. (Supp. II) 2342, can perform the important function of sifting and refining the issues so as to avoid unnecessary decision of constitutional issues, and provide this Court with a developed record on which to assess the conflicting positions of petitioners and the government.

Second, as petitioners also point out, the *Red Lion* case is limited to the personal attack aspects of the fairness doctrine. The Commission's rules, however, also contain provisions for response to editorials by political candidates. Unlike the personal attack doctrine involved in *Red Lion,* the principles underlying these rules have not been considered, even indirectly, by a court of appeals. Sound judicial practice requires, in our view, that their scope and effect be initially considered by the court of appeals before the substantial issues they present are considered by this Court.

Finally, the issues in the instant case may be further narrowed and refined in the light of this Court's decision in the *Red Lion* case. The decision may go far to support the action of the Commission in prescrib-

[4] The United States entertains some doubt that so sweeping an attack on a "legislative" regulation of this sort is an appropriate occasion for judicial review in the absence of actual and concrete facts showing real and direct harm. To the extent that there is substance to these doubts, this is another reason for declining to review the case now.

ing the challenged rules; or, depending on the scope of that decision, the agency itself may be constrained to reconsider and possibly revise its rules. Should it do so, the issues in the court of appeals may be further limited or even eliminated.[5]

3. We of course recognize the important issues which are presented by petitioners' challenge to the Commission's rules in terms of free speech. Both RTNDA and NBC (but not CBS) are challenging the fairness doctrine itself as well as the rules the Commission has issued to implement it. Petitioners' essential concern seems to be that this Court will decide *Red Lion* without their having an opportunity to express their views, and that the decision may prejudice their attack on the rules in the Seventh Circuit. They can satisfy this concern, however, by filing *amici* briefs in the *Red Lion* case, to which we have already given our consent.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari in advance of judgment should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[5] Accordingly, we oppose as well petitioners' suggestion (Pet. 18) that, if certiorari is denied here, the Court's order should state that such denial is without prejudice to an immediate application to the Seventh Circuit for certification of the issues they raise to this Court. We note that certiorari was granted in *Red Lion* despite petitioners' *amici* request that action in that case be deferred pending decision by the Seventh Circuit in the instant case.

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